

MUNICIPAL WATER BILL (2E2SHB 1338)
ECOLOGY/DOH REVIEW OF
POLICY QUESTIONS
January 26, 2004

Questions	State Analysis	Agencies' Preliminary Conclusion or Plan of Action
1. Which rights come within the definition of "municipal water supply purposes"	For rights that don't include "municipal" as a purpose in associated water rights documents (for these rights, see item 2 below) you must assess whether the right fits into one of the three categories of Sec. 1(4)	
	A) In Sec.1 (4)(a) the term "residential use of water for a non-residential population" is best read to mean water service associated with some type of dwelling in which water is used for residential purposes such as drinking, cooking, bathing or any other beneficial use of water under the right generally associated with municipalities.	This would include vacation homes, nursing homes, prisons, temporary housing but would probably exclude restaurants, schools, daycares and factories that stand alone not part of a municipal supply system.
	B) In Sec. 1 (4) (b) a water right qualifies as municipal if it is used for "governmental or governmental proprietary purposes".	"Governmental" or "governmental proprietary purposes" include purposes associated with activities traditionally undertaken by governmental entities in their governmental or proprietary capacity. These would include: water provided for sewers, parks and open spaces, city facilities, fire flow, commercial and industrial activities.
	C) In Sec. 1 (4)(c) water rights qualify as municipal if the water is treated or non-treated and is purveyed to an entity that qualifies under Sec (4) (a) or (b)	
2. Do all water rights with associated documents that describe a municipal purpose and issued prior to the bill qualify after the effective date of the new law?	There may be documents in our files that describe muni purposes for Group B systems.	The agencies assume legislative intent was to exclude Group B systems so they would no longer maintain any "municipal" designation. Any other types (non-group B) will be assessed on case-by-case basis.
3. Will Ecology confirm that a right qualifies as a municipal water supply purpose?	Water rights that qualify under Section 1(4) are designated "municipal" by operation of law. A water right holder may ask Ecology to issue "conforming" documents that confirm the municipal status of a particular right under the new law, but this is not a prerequisite to the right having that status.	Ecology and DOH are developing an approach to acting on requests for conforming documents of this kind.
4. What types of water rights are covered by this bill?	The bill does not limit applicability, so it applies to rights to both ground and surface waters, including rights represented by permits, certificates and claims. The bill applies to unperfected as well as perfected rights.	

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5. Which rights currently held or acquired in the future by a municipal water supplier will not be considered “municipal water supply purpose” and instead must have their purpose changed pursuant to RCW 90.03.380 or RCW 90.44.100 before they are eligible to be treated as municipal rights?	Issue arises when an entity holds multiple water rights and at least one of those rights qualifies as a municipal purpose. This situation raises the question of how will it be determined as to whether the remaining rights held by the entity qualify as municipal purpose rights.	The agencies think the question must be determined on a “right-by-right” analysis. In other words, just because an entity holds one water right that qualifies as a municipal purpose right does not determine whether other rights held by the same entity qualify. The agencies think each right should be examined on its own to determine whether it qualifies as a municipal purpose right.
6. Applying the “right-by-right” approach for rights held by all types of entities, which types of rights must have their purpose of use changed in order to qualify as a “municipal purpose right?”	Water rights that do not qualify as defined in Question 1 above must have their purpose changed under the change statutes to qualify for municipal status. Under Sec. 3 of the bill, a right does not automatically qualify for municipal status simply because it is acquired by an entity that already holds municipal rights. If it does not qualify as a right for “municipal water supply purposes” under Sec 1(4), then an application to change the purpose of use must be filed. Of course, the limitations of RCW 90.03.380 and 90.44.100 would apply, e.g., the purpose of use of an inchoate ground water right could not be changed.	Rights that need to go through the change process include rights with an “agricultural” or “irrigation” purpose of use and this category may include other types of rights as well.
7. If an entity qualifies as a “municipal water supplier” and holds or acquires a Group B right, does that Group B right automatically become a “municipal water supply” right or must it go through the change process?		The agencies are currently reviewing legislative intent around Group B systems, the benefits of their automatic inclusion as municipal suppliers and the amount of inchoate water that might exist in Group B certificates.
8. When Ecology processes a purpose of use change under RCW 90.03.380 or 90.44.100 and Section (3) of the bill to change the purpose of use to “municipal supply purpose”, does Ecology examine historical non-use (relinquishment) issues?	When Ecology processes an application to change the purpose of use to “municipal water supply purposes” where such right does not qualify as a municipal right under the bill, it must evaluate the application under all the requirements of the water right change statutes. Since the purpose of use of an inchoate ground water permit cannot be changed, Ecology will always have to apply the criteria under RCW 90.03.380 and determine the extent and validity of the water right to determine the quantity available for change. See <i>R.D. Merrill Co. v. Pollution Control Hearings Board</i> , 137 Wn.2d 118, 130-131, 969 P.2d 458 (1999).	In evaluating change applications, including those that are submitted pursuant to Section 3 of the new bill, Ecology will examine historical water use issues related to perfection and relinquishment of a non-municipal right.

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	<p>This requires Ecology to first determine what quantity of water was perfected through actual beneficial use, and then determine if any of the perfected quantity was extinguished through statutory relinquishment or common law abandonment. <i>Okanogan Wilderness League v. Town of Twisp</i>, 133 Wn.2d 769, 781, 947 P.2d 732 (1997); <i>Public Util. Dist. No. 1 v. Department of Ecology</i>, 146 Wn.2d 778, 791-792, 51 P.3d 744 (2002).</p>	
<p>9. When will connection and population limit figures contained in water rights documents – including certificates, permits, reports of examination, and applications – be binding limitations on the exercise of water rights?</p>	<p>Section 4 of the bill, which amends RCW 90.03.260, the statute that prescribes the information that must be provided in water right permit applications, states, in relevant part that:</p> <p>“(4) If for community or multiple domestic water supply, the application shall give the projected number of service connections sought to be served. However, for a municipal water supplier that has an approved water system plan under chapter 43.20 RCW or an approval from the department of health to serve a specified number of service connections, the service connection figure in the application or any subsequent water right document is not an attribute limiting exercise of the water right as long as the number of service connections to be served under the right is consistent with the approved water system plan or specified number.</p> <p>(5) If for municipal water supply, the application shall give the present population to be served, and, as near as may be estimated, the future requirement of the municipality. However, for a municipal water supplier that has an approved water system plan under chapter 43.20 RCW or an approval from the department of health to serve a specified number of service connections, the population figures in the application or any subsequent water right document are not an attribute limiting exercise of the water right as long as the population to be provided water under the right is consistent with the approved water system plan or specified number.”</p> <p>The effect of the above quoted provision of the bill is to make water rights that qualify as being for municipal water supply purposes governed primarily by water system plans. Therefore, for such rights, a connection limit or population figure prescribed in the water right documents will not be binding if a water system plan includes a different maximum number of service connections or population limit.</p> <p>As such, DOH is provided with authority and responsibility to determine the maximum number of connections, or population limit, that can be served by a water right that qualifies as municipal. As it reviews water system plans, DOH can accept input from Ecology as to this determination, but it is authorized to make the decisions. This process is governed by a Memorandum of Agreement between Ecology and DOH that can be amended, if necessary.</p>	<p>Ecology and DOH are working together to develop procedures for coordinating Ecology input on water system plan review when connection limits or population figures are topics of the plan submittal.</p> <p>The bill does not expressly address what happens if a DOH water system plan for the entity that holds the water right does not specify a maximum number of service connections. Without further information, we have not formulated a position on this issue. DOH is researching whether there are many water system plans that do not designate specific maximum connection numbers. They are investigating whether or not the number of Equivalent Residential Units (ERUs) will also satisfy the provisions of the law, because that number is what many larger water systems use. After this research is done Ecology and DOH will meet to discuss how DOH might determine plan consistency in the absence of a specified connection (or ERU) number.</p>

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10. What criteria, if any, beyond quantity, will DOH consider in reviewing consistency?	DOH will consider the maximum annual and instantaneous quantities authorized under the water right, and determine the maximum number of service connections based on the factors considered in its water system planning process. DOH uses standard guidance as to how many connections can be served in specific geographic areas based on water right maximum quantities and allows water systems to propose alternative connections limits based on individual factors related to their specific situations.	DOH is reviewing the bill and how it should be implemented.
11. If another right holder believes his/her right will be impaired as a result of the effect of section 4 or any other sections of the bill, does the right holder have any remedy? Does Ecology have a role in addressing this?	There is nothing in the new law that specifies any kind of review of impairment claims when DOH reviews water system plans.	
12. How will the place of use of a municipal water supply right be determined to be equivalent to the service area in an approved DOH water system plan as contemplated by Sec. 5?	<p>Section 5(2) provides: "The effect of the department of health's approval of a planning or engineering document that describes a municipal water supplier's service area under chapter 43.20, or the local legislative authority's approval of service area boundaries in accordance with procedures adopted pursuant to chapter 70.116 RCW, is that the place of use of a surface water right or ground water right used by the supplier includes any portion of the approved service area that was not previously within the place of use of the water right if the supplier is in compliance with the terms of the water system plan or small water system management program, including those regarding water conservation, and the alteration of the place of use is not inconsistent, regarding the area added to the place of use, with: Any comprehensive plans or development regulations adopted under chapter 36.70A RCW; any other applicable comprehensive plan, land use plan, or development regulation adopted by a city, town, or county; or any watershed plan approved under chapter 90.82 RCW, or a comprehensive watershed plan adopted under RCW 90.54.040(1) after the effective date of this section, if such watershed plan has been approved for the area."</p> <p>As with a number of other sections of the bill, it appears that the consequence of Section 5 occurs by operation of law. In other words, the section does not contemplate that either DOH or Ecology will make a determination that the place of use of a water right is equivalent to a service area. However, what the bill does contemplate is that, as part of its process of evaluating a municipal water supplier's water system planning documents, DOH (with input from Ecology and other agencies with expertise on relevant issues) will make the underlying determinations called for in the bill.</p>	<p>DOH will make the "underlying determinations" called for in the bill. These include the determination that "the supplier is in compliance with the terms of the water system plan or small water system management program, including those regarding water conservation" and the determination that "the alteration of the place of use is not inconsistent, regarding the area added to the place of use, with: Any comprehensive plans or development regulations adopted under chapter 36.70A RCW; any other applicable comprehensive plan, land use plan, or development regulation adopted by a city, town, or county; or any watershed plan approved under chapter 90.82 RCW, or a comprehensive watershed plan adopted under RCW 90.54.040(1) after the effective date of this section, if such watershed plan has been approved for the area."</p> <p>It is expected that the entity making the underlying determinations (DOH or a local legislative authority) will make these determinations when it takes action on a document submittal.</p> <p>Given that this section was added to RCW 90.03.386, a section that contemplates DOH and Ecology coordination of water system-related approvals, it makes sense that Ecology should participate in these determinations to the extent that they call for input on topics typically within Ecology's expertise. Thus, Ecology expects to provide input to DOH on the question of whether the alteration of a place of use would be inconsistent with a watershed plan, an area clearly within Ecology's expertise. In addition,</p>

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		DOH is likely to develop a similar process for taking input from other agencies on topics within their expertise, such as CTED and local governments for land use issues.
13. Section 6 of the bill puts in “good standing” those water rights represented by water right certificates issued prior to the effective date of this section for municipal water supply purposes as defined in RCW 90.03.015 where the certificates were issued based on an administrative policy for issuing certificates once works for diverting or withdrawing and distributing water were constructed rather than after the water had been placed to actual beneficial use. What does it mean to be “a right in good standing”? Does the bill contemplate any action on Ecology’s part to confirm that a right is covered by this section?	<p>Since the Supreme Court rejected Ecology’s past practice of issuing certificates before water had been put to actual beneficial use in the <i>Theodoratus</i> case, there has been much discussion regarding the status of those water rights represented by such certificates. See <i>Department of Ecology v. Theodoratus</i>, 135 Wn.2d 582, 957 P.2d 1241 (1998).</p> <p>This section of the bill appears to reject the notion that such rights are invalid as a consequence of Ecology issuing certificates before perfection of the right.</p> <p>Beyond that, the bill does not indicate whether anything else is meant by the phrase “in good standing.”</p>	<p>The bill does not appear to contemplate any action on Ecology’s part to implement the main aspect of this section.</p> <p>Moreover, subsection (2) of Section 6 restricts Ecology’s ability under this section to make adjustments to certificates (adjustments are allowed only if a certificate was obtained through a ministerial error or through misrepresentation). Ecology does not interpret this restriction as precluding Ecology from being able to replace prematurely-issued certificates with superseding permits if such action is taken specifically at the request of the water right holder.</p> <p>Ecology will evaluate, on a case-by-case basis, any requests by a person holding a water right described in this section to have Ecology alter his or her water right documents.</p> <p>Ecology does not intend to require development schedules in conjunction with changes to water rights that are “in good standing” under Section 6 unless it is requested to do so by the applicant.</p>
14. How will the DOH establish new water use efficiency regulations?		See DOH Proposals
15. How will the DOH implement Section 8 of the Act?		See DOH Proposals
16. How will Ecology and DOH work together to implement Section 9 of the Act?		<p>Ecology will work with watershed planning units primarily through the agencies watershed leads to remind the planning units about the requirements to address the future use of existing water rights for municipal supply purposes in their Phase 4 Implementation</p> <p>DOH will comply with Section 9(3) through a consultation process with all pertinent state agencies to assure that adequate coordination is taking place between water system planning and local watershed planning. A workplan will be developed annually to provide detailed direction.</p>

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17. How will Ecology prioritize funding to basins where the exercise of inchoate rights may have a larger effect on streamflows and other water uses?		Ecology will proactively analyze funding priorities through regional initiatives, the development of watershed plans, and the agency's internal planning around instream flow activities.
18. How will Ecology work to require sewer plans to include a discussion of water conservation measures per Section 11 of the Act?		Ecology will implement the sewerage planning requirements through its regional WQ reviews.
19. How will Ecology implement Section 12 of the Act which requires consideration of the use of reclaimed water in RCW 90.48.110 plans?		Same as answer to Question 18 above.
20. How will DOH coordinate the evaluation of the potential for reclaimed water use in water system plans?		See DOH proposal.
21. How will Ecology implement Section 14 of the Act with respect to transfers of unperfected surface water rights.		Ecology will process applications for transfers of unperfected surface water rights pursuant to RCW 90.03.380 as long as the supplier meets the requirements of either Section 14(1)(a)-(d) or Section 14(2)(a)-(d). Ecology and DOH will work together to assure the recipient of water under a water system planning requirements. Ecology will provide notice to affected tribes for any transfers associated with this section.
22. How will DOH implement Section 15 of the Act?		See DOH proposal.
23. How will Ecology implement Section 16 of the Act?		Ecology will work with the watershed planning unit for WRIA 1 to determine if there is interest in pursuing a pilot project as anticipated in the Act.
24. How will DOH implement a process to collect fees as anticipated in Section 18 (6) (f) of the Act?		See DOH proposal.